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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KENNETH COBRETTE ADAMS, Defendant and Appellant.	H036738 (Santa Clara County Super. Ct. No. CC948384)

Defendant Kenneth Cobrette Adams was convicted after jury trial of two counts of second degree robbery with the personal use of a firearm (Pen. Code, §§ 211, 212.5, subd. (c), 12022.53, subd. (b)).[1] The trial court sentenced him to 12 years in prison.

On appeal, defendant contends: (1) the court abused its discretion and violated his due process rights when it denied his motion to sever the two counts for trial; (2) the court erred when it denied his motion to exclude evidence of a photographic lineup; (3) trial counsel rendered ineffective assistance by failing to object to prosecutorial misconduct during closing argument; (4) the court prejudicially erred by denying his motion to suppress; (5) the court erred in instructing the jury; and (6) the cumulative

[1] All further unspecified statutory references are to the Penal Code.

effect of the errors requires reversal. As we find no error requiring reversal, either individually or cumulatively, we will affirm the judgment.

BACKGROUND

Defendant was charged by information with two counts of second degree robbery (§§ 211, 212.5, subd. (c)). The information further alleged as to both counts that defendant personally used a firearm in the commission of the offense. (§ 12022.53, subd. (b).) He filed a motion to suppress "all tangible and intangible evidence and observations and fruits thereof, relating to an illegal search and seizure by officers of the San Jose Police Department, on or about July 1, 2009." The prosecutor filed opposition to the motion and, following a hearing, the court issued a written decision denying the motion.

Defendant filed a pretrial motion to sever the two counts for trial, and a motion in limine seeking to exclude evidence of a photographic lineup on the ground that it was unduly suggestive. The prosecutor filed opposition to both motions, and the court denied both motions prior to jury selection.

The Prosecution's Case

Count 2

On the evening of June 19, 2009, Christine Negus went out to dinner with her long-time friends Kathryn Vineyard and Vineyard's husband. Vineyard drove them all back to her home at the corner of Bellerose Drive and Hedding Street around 10:30 p.m. She parked her car in the driveway and Negus, who had been sitting in the front passenger seat, got out and walked around the back of the car with her purse on her right shoulder. As Negus turned and started to follow Vineyard up the driveway and into the now open garage, she felt a tug on her shoulder. Negus turned around and faced an African-American male who was about two or three feet away from her. The man was about 5'10" tall, in his early 20s, with a mustache and hair on his chin, and he was wearing a gray hooded sweatshirt. The man pressed a gun into Negus's left arm and

angrily told her to give him her purse. She was frightened and leaned back. He grabbed her purse, yanked it away, and ran across Bellerose and east on Hedding. A block away, he got into the passenger side of a small white car and the car took off. Negus identified defendant at trial as the man who had robbed her at gunpoint. Inside her purse were her wallet, credit cards, cell phone, and personal papers.

Vineyard called 911, and both she and Negus spoke to the dispatcher. Vineyard and Negus also spoke to responding officers that night. On June 30, 2009, Negus went to the police station in order to help prepare a sketch of the suspect. When the sketch was complete, Negus thought it was "close" but "not perfect." She felt "comfortable" with the eyes and nose and mouth, and she testified that she thought defendant's eyes and nose and mouth were "a good match" with the sketch.[2] On July 10, 2009, Negus went back to the police station in order to look at a photographic lineup. An officer not otherwise involved in the investigation of the robbery showed her six photos one at a time. After looking at each of the photos for between five and 15 seconds each, and looking at each of them a second time, Negus pointed to one photo and told the officer that she recognized the shape of the man's face, the eyes, the nose, and the mouth. Negus had picked out defendant's photo. An officer involved in the investigation of the robbery then showed Negus a photo of a gun, and she recognized the shape of the barrel of the gun used in the robbery. The officer also showed Negus a photo of a white car. She recognized the car as the one the robber had escaped in. The car was a rental car rented to defendant's aunt, and the gun was the one booked into evidence after the Meridian Avenue robbery.

[2] The sketch was admitted into evidence as People's Exhibit No. 4.

Count 1

On July 1, 2009, Quintus Palliyaguru arrived at his Meridian Avenue home from work around 6:00 p.m. He parked in the garage, which faces Mount Vernon Drive, locked his car, and walked out to the curb to retrieve his recycling bin. He saw two African-American males in their late teens or early 20s, both wearing baseball hats and hooded sweatshirts, walking eastbound on Mount Vernon towards Meridian, and he said hi to them. They walked past him without responding. As Palliyaguru was walking back up his driveway, the two men turned around and ran towards him. Palliyaguru froze while holding the recycling bin in front of him. The two men told him to give them his money and his wallet. He said that he did not have a wallet or any money. One of the men, the one with a mustache, had a gun that he pointed outward towards the ground, so Palliyaguru put his hands up. He was afraid that he was going to be shot. The man without the gun, the taller of the two men, reached into Palliyaguru's pockets and took his work ID and his cell phone, and then both men ran off.

Palliyaguru called 911, and a police officer arrived while Palliyaguru was still on the phone with the dispatcher. A short time later, an officer drove him to a location about a mile and a half away. Three men were individually brought before him while he was still in the patrol car and he identified two of the three men as the men who had robbed him.

San Jose Police Officer Brett Moiseff heard the dispatch that a robbery occurred. As he approached Meridian in his patrol car, a white car with three Black males inside turned in front of him from the direction of the robbery. The officer ran the license plate of the white car and learned that it was a rental car from South San Francisco. The car turned into the parking lot of an office building that appeared to be closed. As the car drove behind the building, the officer waited for it to come back around. When it did, there were only two men in the car. The officer stopped the car and detained the men inside. Defendant was the man sitting in the front passenger seat of the car.

Palliyaguru's cell phone was recovered from a compartment in the front passenger door of the car.

A woman drove up to Officer Moiseff and yelled out that a person was running from the area. Officer Moiseff saw a man wearing a gray hooded sweatshirt run northbound, and relayed that information to dispatch. Another officer stopped and returned that person, Demar Lincoln, to Officer Moiseff's location. Palliyaguru was brought to the location, and he identified defendant as the man who had had the gun, and Lincoln as the man who had removed the items from his person, during the robbery. A loaded handgun was recovered by other officers from a dumpster in the area between where the white car was stopped and where Lincoln was stopped.

Palliyaguru testified at trial that defendant was the man with the gun who had robbed him, and that the gun in evidence at trial looked similar to the gun he had seen during the robbery. Palliyaguru's home is roughly five miles away from Vineyard's home.

The Defense Case

Retired Pastor M.T. Thompson of the Berkeley Mount Zion Baptist Church saw defendant almost weekly during defendant's teenage years. Based on the pastor's knowledge and interaction with defendant, he would be surprised to learn that defendant did anything violent.

Matthew Carton was defendant's freshman and junior English teacher at Berkeley High School. Based on the teacher's knowledge and experience with defendant, he would not expect defendant to be involved in any kind of violence.

Dr. Elizabeth Loftus, a psychologist, testified as an expert in eye-witness identifications and human memory. She testified that researchers in her field divide the process of eyewitness memory into three major stages: acquisition, retention, and retrieval. Various factors can affect the accuracy of people's memories. During the acquisition stage, some of these factors are lighting, how much time people have to look

at what they are trying to remember, whether a gun is involved, whether a stranger is the same or a different race than their own, and trauma. During the retention stage, two factors that can affect accuracy are the passage of time and the exposure of people to post-event information. Post-event contamination can also affect the retrieval stage of memory. There is a relatively weak co-relation between witnesses' certainty as to their eyewitness identifications and their level of accuracy. Erroneous identifications can result in wrongful convictions.

Verdicts and Sentencing

On December 21, 2010, the jury found defendant guilty of both counts of second degree robbery (§§ 211, 212.5), and found true the allegations that defendant personally used a firearm during the commission of the offenses (§ 12022.53, subd. (b)). On March 18, 2011, the court sentenced defendant to 12 years in prison. The sentence consists of the lower term of two years on count 1 with a consecutive term of 10 years for the firearm enhancement, and an identical concurrent term on count 2.

DISCUSSION

The Severance Motion

In defendant's written severance motion he argued that the two counts should be severed for trial because they were not "connected together in their commission," and consolidating the cases would "increase the level of prejudice inherent in the evidence." He further argued that the "the issue of cross-admissibility is dubious," and that little money would be saved by consolidation. At the hearing on the motion, defense counsel argued that "the identification of July 1st was a strong identification of [defendant]. [¶] With respect to June 19th, we don't have that strength. My view it is weak identification. . . ."

In the written opposition to the motion, the prosecutor contended that, because the two counts had been consolidated prior to the preliminary examination on motion of the prosecution, defendant needed to show a change in circumstances. The prosecutor also

contended that the consolidation of the two charges was appropriate because the statutory requirements for joinder had been met, severance was not required even if the evidence was not cross-admissible, and defendant had not demonstrated a substantial danger of undue prejudice.

The court denied the motion "on the merits," stating: "I do think that the charges in this matter are of the same type of case, same class as the statute, and the case[s] referred to – they are both robbery charges. [¶] I do also find there is some cross-admissibility in the evidence – particularly as relates to the alleged firearm – appears to be cross-admissible as to both charges. I don't find the – on my review of the case, the police report and preliminary examination that the two different counts are so disparaging in the strength of them that there would be a problem where a weaker count would be essentially bootstrapped to the stronger count. [¶] I don't think there is a danger of that here. I think the jury will be instructed to consider each separately, and there does appear to be interest of judicial economy in having both identical charges – different dates, but identical charges tried together, so indicate that over defense's objection I will deny the motion to sever."

On appeal, defendant contends that the court erred in denying the motion to sever because "the evidence was not cross-admissible, and support for the Negus robbery was weaker and less probative than that offered in connection with the Palliyaguru robbery. Therefore, the risk of undue prejudice was extremely high, so much so that denial of the motion was equivalent to a denial of due process for [defendant]." "Whether this case is viewed as the joinder of one weak and one strong case, or of two relatively weak cases, the risk of prejudice was too great to ignore, and it outweighed the benefits of joinder," as "any duplication of evidence and consequent saving of public funds was minimal."

The People contend that the court did not err in denying the motion to sever. "Section 954 expresses a policy decision preferring joinder of similar cases except where there is good cause for separate trials. As the trial court found, both charges involved the

same criminal offense, evidence was cross-admissible, neither case was particularly stronger than the other, and joining the cases promoted judicial economy."

The California Supreme Court has outlined the statutory criteria for joinder of charges and the standard of review for an order denying a defendant's motion to sever joined charges. "[P]ursuant to section 954 an accusatory pleading may charge two or more different offenses so long as at least one of two conditions is met: The offenses are (1) 'connected together in their commission,' or (2) 'of the same class.' " (*People v. Soper* (2009) 45 Cal.4th 759, 771, fn. omitted (*Soper*).) The Legislature's purpose in enacting section 954 was to avoid " 'the increased expenditure of funds and judicial resources which may result if the charges were to be tried in two or more separate trials.' [Citation.]" (*Id*. at p. 772.) Accordingly, "consolidation or joinder of charged offenses 'is the course of action preferred by the law.' [Citation.]" (*Ibid*.; *People v. Hartsch* (2010) 49 Cal.4th 472, 493 (*Hartsch*).)

The threshold question is whether the charges were properly joined. Defendant does not contest that the two charges at issue here are identical—both counts alleged second degree robbery with personal use of a firearm—so they are unquestionably "of the same class" and therefore were properly joined. (§ 954; *Soper, supra,* 45 Cal.4th at p. 771.)

The standard of review for an order denying a motion to sever properly joined charges is abuse of discretion. "A defendant, to establish error in a trial court's ruling declining to sever properly joined charges, must make a ' "*clear showing of prejudice* to establish that the trial court *abused its discretion*." ' [Citation.]" (*Soper, supra,* 45 Cal.4th at p. 774.) "Denial of a motion for severance amounts to a prejudicial abuse of discretion if the trial court's ruling falls outside the bounds of reason." (*Hartsch, supra,* 49 Cal.4th at p. 493.) To determine whether the trial court abused its discretion, " 'we consider the record before the trial court when it made its ruling.' [Citation.]" (*Soper, supra,* at p. 774; *Hartsch, supra*, at p. 493.) " 'The factors to be considered are these:

(1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; [and] (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges. . . .' " (*Hartsch*, *supra*, at p. 493.) We must also determine whether joinder resulted in " 'gross unfairness' " amounting to a denial of due process. (*People v. Valdez* (2004) 32 Cal.4th 73, 120-121; see also *Hartsch*, *supra*, at pp. 494-495.)

" 'We frequently have observed that if evidence underlying the offenses in question would be "cross-admissible" in separate trials of other charges, that circumstance normally is sufficient, standing alone, to dispel any prejudice and justify a trial court's refusal to sever the charged offenses. [Citations.] Our cases, however, make it clear that complete (or so-called two-way) cross-admissibility is not required. In other words, it may be sufficient, for example, if evidence underlying charge "B" is admissible in the trial of charge "A"—even though evidence underlying charge "A" may not be similarly admissible in the trial of charge "B." [Citations.]' [Citation.]" (*Hartsch*, *supra*, 49 Cal.4th at p. 493.) "On a motion for severance, the defendant bears the burden of showing that evidence would not have been cross-admissible in a separate trial." (*Id.* at p. 494.)

Here, defendant could not carry his burden of showing that evidence would not have been cross-admissible in separate trials. The same gun and rental car were used in both robberies, and the victim of the first robbery identified the gun and rental car after they were seized following the second robbery. In addition, evidence of the first robbery would have been admissible in a separate trial on the second robbery to prove a common scheme or plan. Both robberies occurred in the driveway of corner residential properties with the use of a handgun, and in both robberies defendant wore a hooded sweatshirt, he demanded the victim's purse or wallet, and he escaped in a white car after initially running from the scene. Therefore, the evidence supported an inference that defendant

employed the same plan in committing both offenses. (See *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1226; *Hartsch, supra*, 49 Cal.4th at p. 494.)

We do not believe that defendant has established any other factor demonstrating the need for a severance. As the charges were identical, neither charge was more likely to unusually inflame the jury against defendant. In addition, we do not find that a weak case was bolstered by joinder with either another weak case or a stronger case. The victim in each case similarly described his or her robber to the 911 dispatcher shortly after the robberies, and both victims identified defendant as the man who robbed them while wearing a hooded sweatshirt and holding a gun. Although Palliyaguru's cell phone was recovered from the car defendant was in shortly after that robbery but none of Negus's belongings were recovered, Negus was able to participate in the preparation of a sketch of her robber, and the sketch resembled defendant. Under the circumstances, the trial court properly rejected defendant's claim of undue prejudice. (*Hartsch, supra*, 49 Cal.4th at p. 494.)

Nor can defendant show actual prejudice amounting to a denial of gross unfairness. The factors noted above, bolstered by the recordings of the 911 calls introduced at trial and the evidence regarding the handgun and white car, closely linked the crimes together. That the evidence presented provided overwhelming evidence of defendant's guilt is evidenced by the fact that the jury took less than one hour to reach its verdicts. The joint trial did not deny defendant due process. (*Hartsch, supra*, 49 Cal.4th at pp. 494-495.)

The Photographic Lineup

In his motion in limine, defendant contended that evidence of the photographic lineup should be excluded on the ground that it was unduly suggestive. He argued that "a number of the people depicted in the lineup photos differed markedly in appearance from [defendant], as well as from Ms. Negus'[s] initial description of her assailant." "Second, the picture of [defendant] was unduly suggestive in itself," in that it was the only picture

depicting "a person wearing a jacket with a hood,[] he is only one of two people depicted wearing light clothing," and "he is the only person depicted with an angry or intense expression." At the hearing on the motion, defense counsel argued in part that defendant is only 5'7" tall, whereas Negus reported her robber was between 5'10" and 6' tall, and that the sketch prepared with Negus's help did not match defendant.

In the written opposition to the motion, the prosecutor contended that the photographic lineup was not suggestive. The prosecutor argued that "the photographic lineup used contained six black males [who] all appear to be approximately the same age. Five of the males have some facial hair, a facial feature victim Negus remembered. . . . Finally, when victim Negus made her identification of the defendant she stated 'nose, eyes and mouth are all similar.' " At the hearing on the motion, the prosecutor argued in part that, "if you look at the six-pack, the only thing that is different about [defendant] that makes him stand out is his hair, and that is the one character trait that Ms. Negus never saw."

Attached to the prosecutor's written opposition was a color copy of the photographic lineup. The court admitted it and a copy of the sketch prepared with Negus's help as exhibits for purposes of the motion without objection. After viewing the exhibits and hearing argument, the court ruled in part as follows: "All right. I am going to . . . deny the motion to exclude evidence of the photographic line-up. I don't find it to be unduly suggestive. Maybe it does not mean that the jury can't conclude that it is not an accurate line-up. That is for a jury – fact for them to determine, but it is not so unduly suggestive that it violates the defendant's due process rights. [¶] I find some similarity particularly in the eyes and facial hair in between the sketch and photograph of [defendant] as well as [defendant] in person in court. I also don't find anything in the photos themselves that would particularly suggest to a person viewing them to pick out [defendant] as opposed to any of the others. [¶] The hair is not similar in many of the photos, but again the person is testifying and is shown by the sketch about the person that

robbed her with a hooded sweatshirt on with no hair visible, so I don't think the difference in hair in any way suggests that [defendant] was more likely the hooded sweatshirt. [¶] The offer of proof in today's motion was that the victim was robbed by a person wearing a dark – possibly gray-colored hooded sweatshirt. [Defendant] is wearing a very bright white – what appears to be a hooded sweatshirt in the line-up. [¶] That does not appear to me would cause a suggestion that that should be the person picked out because of similarity of clothing. The color is not similar. [¶] . . . [¶] Whether that confirmed her identification at the preliminary examination or at the trial if she does or is not able to make an identification is an area that can certainly be questioned on, but I don't think it makes the photographic line-up overly suggestive, so based on those reasons, I am going to deny the motion. [¶] Of course all that means is that it is admissible. The weight of it is to be determined exclusively by the jury."

On appeal defendant contends that the court erred in admitting evidence of the photographic lineup and the identification it produced because the lineup was unduly suggestive. "Here, the suggestion that [defendant] was the perpetrator was readily apparent from the row of photos depicting him as the only young, African American male wearing a hooded sweatshirt – which was the *only* article of clothing Ms. Negus had been able to identify after the robbery. His photo also stood out from the others in that he wore bright white. All but one of the others wore dark clothing." "Turning to the issue of reliability independent of the photo lineup, several factors point to the weaknesses of Ms. Negus's identification." "Thus, her identification cannot be deemed reliable under the totality of the circumstances. Accordingly, [defendant] has established that he suffered a deprivation of his constitutional right to due process under the Fourteenth Amendment when he was made the subject of an overly suggestive photo lineup. The trial court erred by allowing Ms. Negus's identification testimony to be admitted."

The People contend that the court did not violate defendant's due process rights by admitting evidence of the photographic lineup. "Nothing in the lineup caused

[defendant] to stand out from the other five men." "[A]ll of the photographs were of men of similar age and complexion and generally resembled each other." "Moreover, Negus's identification of [defendant] was clearly based not on his clothing but on his physical features, especially his eyes, nose, and mouth." The People further contend that the court did not violate defendant's due process rights by admitting evidence of Negus's identification of defendant because the identification was reliable under a totality of the circumstances.

A pretrial identification procedure that is so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" is a violation of a defendant's right to due process of law. (*Simmons v. United States* (1968) 390 U.S. 377, 384; *People v. Cook* (2007) 40 Cal.4th 1334, 1355 (*Cook*).) "In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 989 (*Cunningham*).) "If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1242, overruled on another point in *People v. Edwards* (1991) 54 Cal.3d 787, 835.)

"The defendant bears the burden of demonstrating the existence of an unreliable identification procedure. [Citations.] 'The question is whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him.' [Citation.]" (*Cunningham*, *supra*, 25 Cal.4th at pp. 989-990; *Cook*, *supra*,

40 Cal.4th at p. 1355.) For instance, it would be impermissibly suggestive to present a lineup in which only the defendant fit the witness's description. However, a lineup is not required to contain persons, or photos of persons, resembling defendant in appearance. (See *Cook*, *supra*, at p. 1355.)

"[T]he standard of independent review applies to a trial court's ruling that a pretrial identification procedure was not unduly suggestive." (*People v. Kennedy* (2005) 36 Cal.4th 595, 609 (*Kennedy*), overruled on another point in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

We conclude that the photographic lineup and identification evidence was admissible as reliable under the totality of the circumstances, taking into account the factors identified in *Cunningham*. Negus had a good opportunity to view the robber at the time the robbery occurred. He was standing about two to three feet away from her when he pressed a gun into her arm and demanded her purse. She was able to see and describe the robber's facial features immediately after the robbery, and she helped prepare a sketch of the robber 11 days later. When the sketch was complete, Negus thought it was "close" although "not perfect." She felt "comfortable" with the eyes and nose and mouth, and she testified at trial that she thought defendant's eyes and nose and mouth were "a good match" with the sketch. Detective Jonathan Atkinson, the detective in charge of the robbery case involving Negus, testified at trial that he prepared the photographic lineup by selecting from a county database of prior arrestees five photos (in addition to defendant's photo) "all of whom matched age, weight, height and physical descriptions provided by the victim at the time of the police interviews and the incident and my follow up areas." "[A]s we saw from the sketch that Ms. Negus produced, the suspect in her incident was wearing a hooded sweatshirt, so the full hair style was covered, so my goal in creating the photo line-up was to create one that was not biased one way or the other towards the hair, and . . . all of the individuals in the photo line-up have slightly different hair styles." During the photographic lineup, which occurred

10 days after the preparation of the police sketch and only three weeks after the robbery, an officer not connected with the case showed Negus the six photos one at a time. After looking at each of the photos for between five and 15 seconds, and looking at each of them a second time, Negus pointed to one photo and told the officer that she recognized the shape of the man's face, the eyes, the nose, and the mouth. Negus had picked out defendant's photo, and her identification was not based on his clothing.

After considering the totality of circumstances discussed above, we conclude that Negus's identification of defendant was reliable and that the trial court did not err in admitting the photographic lineup and the identification testimony at trial. (*Kennedy, supra,* 36 Cal.4th at p. 611; *Cunningham, supra,* 25 Cal.4th at p. 989.)

Ineffective Assistance of Counsel

Defendant contends that trial counsel rendered ineffective assistance when he failed to object to several instances of prosecutorial misconduct during closing argument. Defendant contends that the prosecutor "made two separate comments in which she either vouched for the accuracy of the identification testimony or referred to facts outside the record from her own experience. . . . [S]he [also] improperly appealed to the jury's passion by referring to the fear that a robbery victim would endure." "[O]bjective standards demand a timely objection to prosecutorial misconduct. The failure to do so in this case prejudicially affected the outcome of the trial. Accordingly, trial counsel's performance constitutes a violation of [defendant's] Sixth Amendment [r]ight to effective assistance of counsel."

The People contend that defendant's contention "should be rejected. First, [defendant] has failed to show that trial counsel could have no tactical reason for not objecting. Second, [defendant] has not shown that there is a reasonable probability the outcome would have been different had counsel objected."

" 'Under California law, a prosecutor commits reversible misconduct if he or she makes use of "deceptive or reprehensible methods" when attempting to persuade either

the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights—such as a comment upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action " 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " [Citation.]' [Citation.]" (*People v. Fuiava* (2012) 53 Cal.4th 622, 679.)

" ' "[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature." [Citation.] . . .' Nevertheless, '[a] prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. . . . However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the "facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief," [her] comments cannot be characterized as improper vouching. [Citations.]' [Citation.]" (*People v. Ward* (2005) 36 Cal.4th 186, 215 (*Ward*).) "Opposing counsel may not complain on appeal if the reasoning is faulty or the deductions illogical because these are matters for the jury to determine." (*People v. Lewis* (1990) 50 Cal.3d 262, 283.)

"To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. [Citations.] Counsel's performance was deficient if the representation fell below an objective standard of reasonableness under prevailing

professional norms. [Citation.] Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694 (*Strickland*).) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland*, *supra*, at p. 697.)

"If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation." (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) Where failure to object is the basis of the claim, the defendant's burden is no less. " '[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance.' [Citation.]" (*People v. Chatman* (2006) 38 Cal.4th 344, 384 (*Chatman*).) "[C]ompetent counsel may often choose to forgo even a valid objection. '[I]n the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings. The choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on appeal.' [Citation.] Each of the instances in which defendant now claims his attorney[] should have objected comes within this broad range of trial tactics that we may not second-guess. [Citation.]" (*People v. Riel* (2000) 22 Cal.4th 1153, 1197 (*Riel*).)

During closing the prosecutor argued in part: "[W]hen I was crossing Dr. Loftus, I asked a lot about if you can describe a person differently then identify them because you give a wrong description and you would still be able to identify them. [¶] I asked her that three times and each time she said yes, Ms. Negus maybe got the height wrong, but she has never waived on [sic] her identification of the defendant. There is a difference. For example, last weekend I flew to see my family. My sister has a new boyfriend. It is a big deal. He was actually going to meet the parents. I had met him a month before, but

I didn't know he was anything special, but I saw him. He was okay, and as I'm going to brunch with my family and they're about to meet him, my mom and other sister grilled me of what does he look like? Dying to know details. I said six foot four, dirty blond hair. Kind of like a surfer. [¶] We got to the restaurant. It is crowded and I walked up to a six foot very definite brown-haired guy and not that long of hair and I say hey, it is good to see you again, and I had the right guy. My mom and sister had to pull me aside and double-check my vision because my description was wrong. There is no way you could call this guy a blond. [¶] The point is, I described him wrong, but I identified him right, so if Ms. Negus got the height wrong while a gun is being pointed at her and someone's tugging at her purse and she's leaning backwards, does that mean she didn't see him? No, and Ms. Negus was even able to meet with the sketch artist and draw a sketch."

Later, the prosecutor argued: "Dr. Loftus: Dr. Loftus was not here to give an opinion on Christine Negus or Quintus Palliyaguru. She was simply here to educate us all on memory and eye-witness identification, but think about some of the things she said. Your memory is much better immediately thereafter. [¶] Newsflash, I think we all knew that one. She said that . . . none of us know where we were on [9/11] or probably don't. I was at home at my parent's house. I was awoken by my mother who called me from work, told me to put on the news. I watched it and then I went to a dentist appointment because I didn't know what to do, and I had my teeth cleaned and then on the – I was on a home phone because I had a flight to Europe a week later. [¶] I remember [9/11] because it was traumatic. It was horrifying, so I don't know what Dr. Loftus thinks, but I will remember it. I will always remember it. Christine Negus had never been robbed before. This was scary. This was traumatic. She remembers it."

The prosecutor used "illustrations drawn from common experience" (*Ward*, *supra*, 36 Cal.4th at p. 215) when commenting on Negus's description of the robber shortly after the robbery and when commenting on Dr. Loftus's testimony. However, the prosecutor

misstated Dr. Loftus's testimony. Dr. Loftus testified that the term "flashbulb memory" means that "people who are subjected to a sudden dramatic and emotional event have a detailed and long lasting memories of the same," and that "the [9/11] traged[y]" is an example "in which people accurately recall events of where they were at the time when they heard the news." "[T]hey're longer lasting, but they also are subject to some distortion and decay." "[M]any people have distortions even for those very public events," but "some people [don't] have distortions." Nevertheless, counsel's failure to object to the prosecutor's argument does not establish deficient performance. (*Chatman, supra,* 38 Cal.4th at p. 384; *Riel, supra,* 22 Cal.4th at p. 1197.)

Further, it is not reasonably probable that a determination more favorable to defendant would have resulted had counsel objected, since the court instructed the jurors pursuant to CALCRIM No. 226 that it was for them alone to judge the credibility or believability of the witnesses, the court instructed the jurors pursuant to CALCRIM No. 315 on the various factors they could consider when evaluating an eyewitness's identification testimony, and the court instructed the jurors pursuant to CALCRIM No. 332 on the various factors they could consider when evaluating an expert witness's testimony. (*Strickland, supra,* 466 U.S. at p. 688.)

The prosecutor also argued to the jury that "[w]hen you go home at the end of the day, that is your sanctuary. It has been a long day today, and I can't wait to get in the car to go home[,] to take off my [heels], relax. It is raining out. All you want to do is go home. You don't feel well, what do you want to do? You want to go home, but he stole that from them, and now home isn't safe." " 'It is, of course, improper to make arguments to the jury that give it the impression that "emotion may reign over reason," and to present "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response." [Citation.]' [Citation.]" (*People v. Redd* (2010) 48 Cal.4th 691, 742.) "[A]n appeal for sympathy for the victim is out of place during an objective determination of guilt."

(*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, reversed on another ground in *Stansbury v. California* (1994) 511 U.S. 318.) As we stated above, however, counsel's failure to object to this argument by the prosecutor does not establish deficient performance of defense counsel. (*Chatman*, *supra*, 38 Cal.4th at p. 384; *Riel*, *supra*, 22 Cal.4th at p. 1197.)

Further, it is not reasonably probable that a determination more favorable to defendant would have resulted had counsel objected. The prosecutor later argued to the jurors that they could not "think about and … consider . . . [¶] Passion: Your emotions have to be set aside. Passion, public opinion . . . ." In addition, the court instructed the jurors pursuant to CALCRIM No. 200 that it must "not let bias, sympathy, prejudice, or public opinion influence your decision," and we must "presume that jurors understand and follow the court's instructions." (*People v. Gray* (2005) 37 Cal.4th 168, 231.) Defendant has not shown that trial counsel rendered ineffective assistance. (*Strickland*, *supra*, 466 U.S. at p. 688.)

The Motion to Suppress

Officer Moiseff was the sole witness at the May 7, 2010 hearing on defendant's motion to suppress. He testified as follows.

Around 5:59 p.m., on July 1, 2009, he heard a dispatch broadcast about an armed robbery that had just occurred on Meridian near Willow. The suspects were reported to be two Black males in their early 20s, one of whom had a firearm, and both of whom left the scene of the robbery on foot. The officer and his partner were parked on Willow Street, not very far from the robbery location. The officer started driving slowly towards Meridian. Around 6:01 p.m., a white Chevrolet with three Black males inside turned in front of the patrol car from the direction of the robbery. Approximately one minute later, the car then turned into the parking lot of what appeared to be a closed business. No other vehicles were in the parking lot, no lights were on in the business, no "open" sign was lit, and the officer could not see any people inside the business. The officer ran the

license plate of the car, and learned that it was a rental car from South San Francisco. The car pulled around to the back of the business and the officer waited for the car to come back out. When it did, the officer noted that there were only two men inside the car. The officer thought that this was "suspicious" because "[i]t was consistent with either a person either hiding in the back seat and/or fleeing the scene after what I thought was someone trying to elude me perhaps or at least be sneaky."

The officer initiated a traffic top of the car because he believed the men inside may have been involved in the robbery: "The subjects were very close in coming from the direction of where the robbery had been broadcast. Two of the persons in the vehicle fell within the parameters of the descriptions being broadcast. [¶] They turned into a business – or the driver turned into a business which appeared to be closed, and the vehicle also was a rental car from another city. I just had experience in different cases where persons from other cities using rental cars or stolen vehicles have conducted crimes in cities other than where the vehicle is from, so based on all of those circumstances put together within the timeframe and now with coming out of this closed business with what appeared to be a third person now missing, I initiated the stop." "[W]hat I was doing is based on my experience that is consistent with suspects or codefendants or co-conspirators dropping each other off or fleeing or eluding law enforcement in different ways. It just doesn't necessarily mean that is exactly what is happening, but it was consistent with that given everything else that was happening at that same time."

Defendant was the passenger in the stopped car. When a woman in a pickup truck yelled at the officer that a man was running from the scene, the officer looked up and saw a Black male wearing a hooded jacket walking rapidly down the street. At the same time, the dispatcher reported that a suspect had been wearing a gray hooded jacket. So the officer directed other officers to find and stop the retreating man. The man was detained, and a loaded handgun was retrieved from a dumpster located between where the car was

stopped and where the retreating man was stopped. The robbery victim was brought to the scene shortly after 6:20 p.m., and identified defendant and the man who had been retreating from the scene. Defendant was arrested and the car was searched. A cell phone belonging to the robbery victim was seized from a compartment in the front passenger door of the car. The distance between where the robbery occurred and where the car was stopped is approximately two miles.

After hearing argument from the parties, the court took the matter under submission. On May 20, 2010, the court filed its three-page order denying the motion to suppress, finding that the officers "had a reasonable suspicion of criminal activity when they stopped the car in which defendant was a passenger." "The defendant attempts to characterize the car stop as one based entirely on 'race alone' and therefore was an improper detention. While race is plainly relevant here – the occupants of the white Chevrolet matched the racial description of the robbers – it was not the only factor reasonably relied on by the officers in deciding to stop the white Chevrolet. [¶] Officer Moiseff testified that the white Chevrolet immediately turning off the road, into essentially a vacant parking lot, when being followed by a police car, was, in his experience, consistent with criminal behavior – i.e. avoiding police contact. Officer Moiseff additionally testified that the vehicle leaving the parking lot with one less visible occupant was also consistent with criminal behavior. That is, suspects 'splitting up' after a crime, or a suspect hiding within the vehicle. [¶] Most important, in the Court[']s view, is the proximity in time and distance of the crime to the detention. Defendant was detained within a few minutes of when the crime occurred and within a very short distance of where the crime occurred. [¶] The extremely close proximity of the white Chevrolet in time and distance to the occurrence of the robbery, the movement of the white Chevrolet consistent with criminal activity, and the occupants of the white Chevrolet matching the physical description of the robbers, all show that officers Moiseff and [his partner] had reasonable, articulable grounds to detain the white Chevrolet."

On appeal, defendant contends that the court erred in denying the motion to suppress because "none of the circumstances gave rise to a legitimate suspicion of criminal activity, when viewed in their totality." He argues that he was "acting in a normal, law-abiding fashion but matched the physical description just because he was a young [B]lack male in the same general vicinity as the crime. 'Young,' '[B]lack' and 'male' are vague characteristics that are shared by a large section of the populace. They describe too many individuals to create a reasonable suspicion that the occupants of the car, *in particular*, were engaged in criminal activity."

The People contend that the officer's decision to detain the white Chevrolet was based on reasonable suspicion of criminal activity. The People argue that Officer Moiseff's testimony "identified 'specific articulable facts' supporting his detention of [defendant], which was not based solely on his race. Rather, it was based on his proximity to the robbery scene, the temporal proximity to the robbery, as well as the suspicious activities of the white Chevrolet pulling into a parking lot of a closed building and then exiting without one of its occupants." "Under a totality of the circumstances, Moiseff's observations provided reasonable cause to detain [defendant]."

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362 (*Glaser*).)

"The Fourth Amendment . . . prohibits seizures of persons, including brief investigative stops, when they are 'unreasonable.' [Citations.]" (*People v. Souza* (1994) 9 Cal.4th 224, 229 (*Souza*).) "The guiding principle in determining the propriety of an investigatory detention is 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' [Citations.] In making our determination, we examine 'the totality of the circumstances' in each case. [Citations.]"

(*People v. Wells* (2006) 38 Cal.4th 1078, 1083 (*Wells*); accord *Whren v. United States* (1996) 517 U.S. 806, 809-810.)

A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts, which considered in light of the totality of the circumstances provide some objective manifestation that the person detained may be involved in criminal activity. (*Souza, supra*, 9 Cal.4th at p. 231; see also *In re Tony C.* (1978) 21 Cal.3d 888, 893.) The reasonable suspicion that justifies a detention is simply a particularized and objective basis for suspecting the person stopped of criminal activity. (*Ornelas v. United States* (1996) 517 U.S. 690, 696.)

"Reasonable suspicion is a lesser standard than probable cause. . . . But to be reasonable, the officer's suspicion must be supported by some specific, articulable facts that are 'reasonably "consistent with criminal activity." ' [Citation.] The officer's subjective suspicion must be objectively reasonable, and 'an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith. [Citation.]' [Citation.] But where a reasonable suspicion of criminal activity exits, 'the public rightfully expects a police officer to inquire into such circumstances "in the proper exercise of the officer's duties." [Citation.]' [Citation.]" (*Wells, supra*, 38 Cal.4th at p. 1083; see also *Glaser, supra*, 11 Cal.4th at p. 363.)

Standing alone, a vague description does not provide reasonable grounds to stop every person falling within that vague description. (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 381-382.) However, more particularized descriptions, together with additional circumstances known to the officer, may justify a stop. (*Id.* at p. 382.) The types of additional descriptions or circumstances typically relied on by officers making investigatory stops include: information on the physical characteristics of the suspects, such as age, gender, race, hair and eye color, height and build, and attire (*id.* at pp. 380-382; *People v. Craig* (1978) 86 Cal.App.3d 905, 911-912); or a close temporal or

geographical connection between the crime and the car or suspects (*People v. Conway* (1994) 25 Cal.App.4th 385, 390; *People v. Lazanis* (1989) 209 Cal.App.3d 49, 54). In addition, the officer's articulable facts can be based on "the totality of the circumstances." (*United States v. Cortez* (1981) 449 U.S. 411, 417.) "This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' [Citation.]" (*United States v. Arvizu* (2002) 534 U.S. 266, 273.)

In this case, Officer Moiseff, who was in a patrol car near the scene of a reported robbery, saw the white Chevrolet come from the direction of the robbery shortly after the robbery occurred. The Chevrolet was a rental car from out of the city. Two of the three occupants of the car matched the description of the robbery suspects (young, Black males), and the officer had experience with rental cars from out of the city being used in robberies. The driver of the car turned into the parking lot of a closed business and drove around the back of the business. When the car came back into view, the officer could only see two occupants of the car. This meant that the third occupant of the car was either hiding in the back seat or was fleeing from the scene in an attempt to elude police contact. Under the totality of the circumstances, we find that Officer Moiseff's decision to stop and investigate the occupants of the car was based on "articulable facts that are 'reasonably "consistent with criminal activity," ' " and was not "predicated on mere curiosity, rumor, or hunch" (*Wells*, *supra*, 38 Cal.4th at p. 1083), or on only a vague description of the robbery suspects. (*In re Carlos M.*, *supra*, 220 Cal.App.3d at p. 381-382.) Accordingly, the trial court did not err in denying the motion to suppress.

Instructions on the Enhancements

The information alleged that defendant personally used a firearm in the commission of both robberies. (§ 12022.53, subd. (b).) Therefore, the court instructed the jury pursuant to CALCRIM No. 3146, the pattern instruction on the enhancement

regarding personal use of a firearm, as to both counts. At defendant's request, the court also instructed the jury pursuant to CALCRIM No. 3131, the pattern instruction on the lesser enhancement of being personally armed with a firearm (§ 1203.06, subd. (b)(3)), as to count 1. Pursuant to CALCRIM No. 3131, the court instructed the jury: "Defendant has been charged in count one with robbery of Quintus Palliyaguru. It is further alleged that the defendant personally used a firearm during the commission of that robbery. [¶] You have been instructed on the definition of personal use of a firearm. See instruction [3146]. If you find the defendant guilty of the robbery alleged in count one, and you find that the allegation of the defendant personally used a firearm not true, then you must decide whether the defendant was personally armed with a firearm during the commission of the robbery charged in count one. [¶] You must return a separate finding for this allegation only if you have found the allegation that the defendant personally used a firearm during the commission of the robbery to be not true. [¶] The term firearm is defined in another instruction. A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting. A firearm does not need to be loaded. A person is armed with a firearm when that person: one, carries a firearm or has a firearm available for use in either offense or defense, and two[,] knows that he or she is carrying a firearm and has it available for use."

During closing arguments, the prosecutor argued in part: "The arming in lesser [*sic*] is also only attached to count one. So when you go into the jury deliberation room, you look at count one. You ask: Have I [the prosecutor] proved the elements that Quintus Palliyaguru was robbed. Assuming you say yes, then you move: Was the weapon displayed in a menacing manner and if you say true, you are done with count one and you never even get to the discussion of armed. [¶] If you think for some reason Quintus lied about it being out there and frightening and intimidating, then you talk about was it armed, but the facts don't really show arming. They show use because in order for Quintus to call 9-1-1 and say there was a gun involved, it had to be displayed, and I can't

even think of a situation when someone's taking something from me and the gun is displayed in a non-menacing manner: Hey, buddy I have an armed gun. Let me have your wallet. That is the only way. That is not what happened, so this is not an issue."

The court later instructed the jury on how to fill out the verdict forms as follows: "You're going to have the verdict forms which will go back there with you. They're pretty much self-explanatory, so verdict form for count one, either fill in guilty or not guilty when you reached a verdict and the foreperson signs it and dates it. [¶] Same for count two, and there are allegations – armed allegations related to the firearms as to each count. The allegation is that [defendant] used a firearm in commission of, during the commission of the robbery. [¶] If you find him not guilty of the robbery, do not fill out the allegations. They don't apply. They only apply – the arming allegations only apply if there is a conviction, so if you for example find him not guilty of count one, then you leave each of the allegations blank as to count one. [¶] If you find him guilty of count one, then you go to the allegations. If you find him guilty of personally using a firearm as defined in these instructions, you would fill that out as true, and that would be the completion of count one. [¶] If you found that he did not use a firearm, found him guilty of robbery in count one but you believe he did not use the firearm, then you would go to the second allegation to count one which is whether he was armed with a firearm, and both attorneys addressed that in their closing argument – the difference between those two, but these I cannot accept both of these to be true. [¶] You know, it has to be the – you only go to the armed allegation. If you find the use allegation not true, sort of do in order, and then count two is again just the robbery verdict, and then the use allegation. There is no alternative arming allegation as to count two. There is only the use allegation."

On appeal, defendant contends that the court erred in instructing the jury that it was not to consider the lesser enhancement until it had found the greater enhancement not true. "Here, the trial court's verbal instruction[s] erroneously described the law by telling

the jurors they could *only* consider the lesser 'personally armed' enhancement *if* they unanimously found the greater 'personal use' allegation not true. The error was compounded by the written version [of CALCRIM No. 3131] the jurors took with them into deliberations, which had been modified to state the same thing. Because both of these erroneous instructions were consistent with the prosecutor's closing argument, the jury no doubt understood them to correctly state the law. This had the effect of prohibiting them from considering the offenses in any other order, which is error."

The People first contend that defendant has forfeited any claim of error because he requested the giving of CALCRIM No. 3131 and did not object to its modification. The People also contend that there was no instructional error because "the trial court's instruction[s] did not dictate the order in which the jury could *consider* the greater and lesser enhancements. Rather, [they] instructed the jury on the order of returning its *findings*." Lastly, the People contend that any error was harmless.

"[A] court may 'restrict[] a jury from *returning a verdict* on a lesser included offense before acquitting on a greater offense' but may not 'preclude [it] from *considering* lesser offenses during its deliberations.' " (*People v. Berryman* (1993) 6 Cal.4th 1048, 1073, 1076 (*Berryman*), overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Kurtzman* (1988) 46 Cal.3d 322, 324-325 (*Kurtzman*).) "Error of this sort appears to implicate California law only. 'It is the general rule for error under state law that reversal requires prejudice and prejudice in turn requires a reasonable probability of an effect on the outcome.' [Citation.]" (*Berryman, supra,* at p. 1077, fn. 7.)

" 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation.] But that rule does not apply when . . . the trial court gives an instruction that is an incorrect statement of the law." (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.) In addition, we may

review a claim of instructional error that affects the defendant's "substantial rights," with or without a trial objection. (§ 1259.) "Although section 1259 allows us to review—even in the absence of an objection—instructional error that affects substantial rights, the trial court's decision to give [a revised version of CALCRIM No. 3131] was not erroneous in any of the usual senses of being legally incorrect, misleading, or unrelated to the facts of the case." (*People v. Dennis* (1998) 17 Cal.4th 468, 534-535.)

In this case, defendant requested that the court instruct the jury with CALCRIM No. 3131, and it did not object to the revised version of CALCRIM No. 3131 the court gave. The court revised CALCRIM No. 3131 because the pattern instruction is intended to be given when a defendant is actually charged with a enhancement that alleges he or she was personally armed with a firearm. That is not the case here; defendant was charged with an enhancement that alleged he personally used a firearm, and the personal arming allegation was a lesser included enhancement of the personal use enhancement. Thus, the revised version of CALCRIM No. 3131 informed the jurors that, if they "*find* that the allegation of the defendant personally used a firearm not true, then you must decide whether the defendant was personally armed with a firearm during the commission of the robbery charged in count one. [¶] You must return a separate *finding* for this allegation only if you have *found* the allegation that the defendant personally used a firearm during the commission of the robbery to be not true." (Italics added.) Accordingly, from the record before us, we can infer that defendant was in agreement with the court that the instruction as revised told the jurors that they could *return a verdict* on the lesser enhancement true only if they found the greater enhancement not true, but the instruction did not tell the jurors that they could *consider* the lesser enhancement only if they found the greater enhancement not true. (*Kurtzman*, *supra*, 46 Cal.3d at pp. 324-325.) As a result, defendant has forfeited his claim of instructional error as to the revised version of CALCRIM No. 3131 given to the jury in this case. (See *People v. Bolin* (1998) 18 Cal.4th 297, 326 [forfeiture found where defense counsel

agreed to giving of instruction and raised no objection]; *People v. Stone* (2008) 160 Cal.App.4th 323, 331.)

Even if we were to find that defendant has not forfeited his claim regarding CALCRIM No. 3131, we would find any instructional error harmless. On this record, there is no reasonable likelihood that the jury construed or applied the challenged instructions in a manner offensive to *Kurtzman*. As our Supreme Court stated in *Berryman*, *supra*, 6 Cal.4th at page 1077: "We do not overlook certain language in the instructions themselves that arguably suggested that the jury was required to deliberate on the charges and allegations in a specified order. Neither do we overlook . . . comments in the prosecutor's summation, referred to above . . . to similar effect. Nevertheless, we believe that a reasonable juror would have understood and employed the instructions—which he or she was directed to consider as a whole and in context—simply to govern how the jury was to return its verdicts and findings after it completed its deliberations on the charges and allegations. This is because, in accordance with their very terms, the instructions spoke much of returning verdicts and findings and little of deliberating on the charges and allegations." (Fn. omitted.)

Cumulative Error

Defendant contends that he suffered a deprivation of several of his constitutional rights that, in the aggregate, had the additional effect of denying him a fair trial. We reject that claim. In *People v. Hill*, *supra*, 17 Cal.4th at pages 846-847, the California Supreme Court reversed a conviction after finding several instances of prosecutorial misconduct and several other errors in the trial. However, if there were any errors at trial here, they were few in number and harmless. Whether considered individually or for their "cumulative" effect, they could not have affected the process or result to defendant's detriment. (See *People v. Sanders* (1995) 11 Cal.4th 475, 565.)

DISPOSITION

The judgment is affirmed.

_____
BAMATTRE-MANOUKIAN, J.

WE CONCUR:

_____
RUSHING, P.J.

_____
PREMO, J.